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October 4, 2004

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S. W.
Washington, DC 20554

In the Matter of:
Unbundled Access to Network Elements
WC Docket No. 04-313
Review of Section 251 Unbundling
Obligations of Incumbent Local Exchange
Carriers
WC Docket No. 01-338

Dear Ms. Dortch:

Enclosed for filing please find the Office of Consumer Advocate's Comments in the above-referenced matter.

If you have any questions, please feel free to contact me.

Sincerely yours,

Joel H. Cheskis
Assistant Consumer Advocate

Enclosure
cc: Best Copying & Printing, Inc.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

In the Matter of	:	
	:	
Unbundled Access to Network Elements	:	WC Docket No. 04-313
	:	
Review of Section 251 Unbundling	:	WC Docket No. 01-338
Obligations of Incumbent Local Exchange	:	
Carriers	:	

**COMMENTS OF THE
PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE**

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I. INTRODUCTION

The Pennsylvania Office of Consumer Advocate (“PA OCA”) hereby submits these Comments in response to the Order and Notice of Proposed Rulemaking (“NPRM”) released by the Federal Communications Commission (“FCC”) on August 20, 2004 in the above-captioned proceeding. The PA OCA represents the interest of Pennsylvania consumers in utility proceedings at both the state and federal level.¹ The PA OCA has been active in setting the terms of unbundled network elements (“UNE”) and local telephone competition at both the state and federal level including advocating consumer interests on behalf of members of the National Association of State Utility Consumer Advocates (“NASUCA”) before the FCC.

Through the NPRM, the FCC solicits comments on alternative unbundling rules that will implement the obligations of section 251(c)(3) of the Telecommunications Act of 1996 (“TA-96”)² in a manner consistent with the U.S. Court of Appeals for the District of Columbia’s decision in USTA II.³ Coincident with the NPRM, the FCC issued an Order taking several steps designed to avoid disruption in the telecommunications industry while the new rules are being written.⁴ The FCC noted that “the actions we take today are designed to advance the Commission’s most important statutory objectives: the promotion of competition and the protection of consumers”⁵ while further noting that “our primary goal in implementing section 251 is to advance the development of facilities-based competition.”⁶ The NPRM articulates several issues in which the FCC seeks specific comment.

¹ See, 71 P.S. §309-4.

² 47 U.S.C. §151, *et seq.*

³ NPRM at ¶ 1; *citing*, United States Telecom Ass’n v. FCC, 359 F.3d 554 (D.C. Cir. 2004)(“USTA II”), *pets. for cert. pending*.

⁴ Id.

⁵ Id.

⁶ Id. at ¶2.

The PA OCA provides its comment in response to many of those specific issues below. In general, the PA OCA submits that the FCC should continue to require incumbent local exchange carrier's ("ILECs") to provide the UNE platform ("UNE-P") to competitive local exchange carriers ("CLECs") – particularly in the mass market. The UNE-P is the basis for much of the local residential telephone competition in Pennsylvania, as well as other states. If Verizon-Pennsylvania and Verizon North (collectively referred to as "Verizon"), the dominant Pennsylvania ILECs, were not required to offer the UNE-P to CLECs, a substantial portion of local residential competition in Pennsylvania would disappear.

In support of its Comments, the OCA submits as follows:

II. COMMENTS

A. Verizon Must Be Required To Continue To Provide Unbundled Access To Switching To Competitive Local Exchange Carriers Pursuant To Section 251(c)(3) Of The Telecommunications Act of 1996.

1. The Outcome Of This Proceeding Will Have A Tremendous Impact On The State Of Telecommunications Competition Throughout Pennsylvania As Over Half Of The Local Customers Served By Competitors In Verizon's Territory Are Served Through UNE-P.

To a large extent, the FCC's decision in this proceeding will determine the future of Pennsylvania's competitive local telecommunications marketplace. Real residential competition has achieved a small foothold in some parts of Pennsylvania, but much of that may be lost depending on the outcome of this proceeding. The FCC should establish new rules that support competition and administrative efficiency while at the same time meeting the requirements of TA-96 and case law interpreting it. The PA OCA cautions against defining a market that is too large and eliminating UNEs based upon perceived competition via a broad brush approach in a wide geographic area. This may have the unintended effect of finding

competitive alternatives outside of the largest urban centers, i.e. where such alternatives have established the greatest market share. The FCC must proceed cautiously as a finding of no impairment for some UNEs may have a devastating impact on local telephone competition.

This case is about achieving the goals and objectives of the United States Congress as articulated in TA-96 to foster local telephone competition. As the Pennsylvania Public Utility Commission's ("PA PUC") noted in its Order commencing the Pennsylvania TRO proceeding:⁷

In 1996, Congress adopted a national policy of promoting local telephone competition through the enactment of the Telecommunications Act of 1996. TA-96 relies upon the dual regulatory efforts of the Federal Communications Commission and its counterpart in each of the states, including this Commission, to foster competition in local telecommunications markets.⁸

The UNE-P is the principal way in which this goal has been achieved in Pennsylvania.

The record established in the Pennsylvania TRO proceeding contains evidence regarding the impact that the results of this current FCC proceeding may have on residential customers in particular. In particular, the evidence of record in the Pennsylvania TRO proceeding shows that there are over 315,600 residential lines and over 128,700 business lines in service in Verizon's territory using UNE-P.⁹ Therefore, over half of the local customers served by CLECs in Verizon's territory are served through the UNE-P and UNE-P has become a mainstay of residential competition in Pennsylvania. Termination of UNE-P would further strengthen Verizon's hold on the residential market in Pennsylvania. A Herfindahl-Hirschman Index ("HHI") study that is in the record of the Pennsylvania TRO proceeding shows that Verizon is

⁷ Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements, Docket No. I-00030099, Order (entered Oct 2, 2003) ("Pennsylvania TRO Proceeding").

⁸ Id.

⁹ See, Id. at Verizon Hearing Exhibit 2 (Verizon response to PUC data requests) and Verizon response to MCI I-41.

continuing to dominate local service in Pennsylvania¹⁰ despite the moderate successes by CLECs through UNE-P. The HHI analysis is a range from a scale of 0 to 10,000 which the higher values indicating the greater existence of a monopoly, lower values indicating competitive markets and a score of 1,800 indicating when a market is highly concentrated. The evidence of record in this proceeding indicates a range of HHI scores of 5,719 for the Allentown-Bethlehem-Easton market area to a score of 9,238 for Philadelphia zone 2.

PA OCA witness Rowland Curry¹¹ testified that, for example, “competition for residential customers relies heavily on the ability of competitive carriers to purchase UNE-P services from [Verizon]” and that “to the extent that adequate competitive options are available, there should be no harm to the ability of customers to select competitive options. However, the OCA is very concerned that if UNE-P elements are eliminated, Pennsylvania customers will no longer be able to benefit from competitive choice.”¹² Clearly, such a situation would be particularly troublesome for many customers for whom UNE-P is their only competitive option for local telephone service.

The FCC must be aware that its decision in this case will affect over 440,000 UNE-based Pennsylvania telecommunications lines, most of which are used to serve residential customers. The FCC should be aware that the basis for serving half of the CLEC provisioned local lines in Verizon’s Pennsylvania territory would be eliminated if Verizon was no longer required to provide UNE-P to CLECs. The FCC must make its decision being fully aware of the competitive facts so that it can follow the goals of TA-96. The outcome of this proceeding will

¹⁰ Id. at OCA St. 1 at 5-7.

¹¹ Mr. Rowland Curry is the Principal of Curry & Associates, an independent telecommunications consulting firm. He has 34 years experience in the telecommunications industry, predominantly focusing on state and federal regulatory policy and technological issues. Prior to beginning his career as a consultant in 2001, he worked on the staff of the Public Utility Commission of Texas for almost 25 years, most recently as Chief Engineer, Office of Policy Development. Mr. Curry is a Registered Professional Engineer in the state of Texas.

¹² Pennsylvania TRO Proceeding at OCA St. 1 at 4.

have a tremendous impact on the state of telecommunications competition throughout Pennsylvania. Competition has not yet gained a strong enough foothold to eliminate the key local circuit switching element, the UNE-P, in any market in Pennsylvania. If Verizon is no longer required to provide UNE-P to CLECs, mass market competition will be diminished and customers will no longer receive the benefits of competitive choice.

2. The Summary Of The Record Evidence In The Pennsylvania TRO Proceeding Reveals That Competitors Are Impaired Without The UNE-P.

As a result of the FCC's Triennial Review Order,¹³ the PA PUC, as well as many other states, conducted an investigation into the obligations of ILECs to unbundled network elements.¹⁴ At the same time, the Triennial Review Order was appealed to the DC Circuit and subsequently reversed in part and affirmed in part. USTA II, the DC Circuit decision in that appeal, was issued prior to any definitive action by the PA PUC on its investigation. However, the record in the Pennsylvania TRO proceeding had closed and presiding Administrative Law Judge Michael C. Schneirle was preparing a Recommended Decision at the time USTA II was released. As a result of USTA II, the PA PUC suspended activity in the Pennsylvania TRO proceeding on March 25, 2004. On June 3, 2004, the PA PUC, by Secretarial Letter, directed ALJ Schneirle to prepare a summary of the record evidence as the next step of the proceeding.¹⁵

More specifically, the PA PUC indicated that

The Commission anticipates that such summary will be useful to Commissioners and staff, despite the legal uncertainty surrounding the [Triennial Review Order]. At a minimum, the summary will

¹³ Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-146, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003)(“Triennial Review Order” or “TRO”), *vacated in part and remand in part in*, 359 F.3d 554 (D.C. Cir. 2004).

¹⁴ *See*, Pennsylvania TRO Proceeding, fn. 7, *supra*.

¹⁵ Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements, Docket No. I-00030099, Secretarial Letter (dated June 3, 2004)(“Secretarial Letter”).

enhance the Commission's understanding of the presence of facilities-based competition in Pennsylvania today.

* * * *

It will summarize what the record shows as to the existence of alternative (non-Verizon) switches, transport and high capacity loops on a geographic basis to serve wireline customers.¹⁶

ALJ Schneirle issued his Summary on June 24, 2004.¹⁷

In its NPRM, the FCC recognized the efforts by state commissions in response to its Triennial Review Order.¹⁸ As a result, the FCC "encouraged state commissions and other parties to file summaries of the state proceedings" and to coordinate with one another regarding the filing of that information.¹⁹ The PA OCA submits that, as noted by its own terms in the Schneirle Summary, "the information regarding the state of facilities based telephone competition that may be gleaned from this record is interesting but limited."²⁰ As discussed further below, the record in the Pennsylvania TRO proceeding cannot now be used to make a finding of non-impairment for CLECs using the UNE-P in Verizon's territory in Pennsylvania.

More specifically, with regard to mass market switching, the Schneirle Summary noted that specific switch locations and numbers of customers served are proprietary to the CLEC but that the summary "provides a general feel concerning the presence of competitive switching across Pennsylvania."²¹ In discussing the specific method used by Verizon to meet its burden under the Triennial Review Order that CLECs are not impaired without access to UNE-P, the Schneirle Summary notes that "the biggest single problem with Verizon's compilation [of

¹⁶ Id. at 1-2.

¹⁷ Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements, Docket No. I-00030099, Summary of Record Evidence (dated June 24, 2004) ("Schneirle Summary") (attached hereto as Appendix A).

¹⁸ NPRM at ¶15.

¹⁹ Id.

²⁰ Schneirle Summary at 19.

²¹ Id. at 9.

data] is that it does not separate residential from small business lines.”²² The Schneirle Summary also notes the “next biggest problem” with Verizon’s data revolves around the treatment of a particular CLEC who holds the contract with the Commonwealth of Pennsylvania for the provision of telephone and data networks services to the entire government yet Verizon included all of their lines as mass market lines.²³ The Schneirle Summary particularly notes one flaw where Verizon provided a “number of lines for the Harrisburg MSA that was so large in comparison to the population of the Harrisburg area that the lines reported had to include those under the Commonwealth contract”²⁴ that should not be counted as mass market lines. Thus, the OCA continues to be concerned that the Verizon data includes large business customers in with its count of the “mass market”.

The Schneirle Summary further notes that Verizon’s estimate of a facilities-based competitive presence was over-estimated because it includes lines that are attributable to cable television companies and affiliates of non-Verizon ILECs.²⁵ The record evidence details why lines that are attributable to cable television companies and affiliates of non-Verizon ILECs does not accurately represent whether CLECs are impaired without access to the UNE-P. The FCC itself has previously questioned the relevance of intermodal alternatives, such as cable telephony providers and competitive affiliates of non-Verizon ILECs, in determining whether the statutory objective of Section 251(c)(3) had been met.²⁶ Furthermore, the FCC has stated that “carriers relying on intermodal alternatives have not needed to overcome the same kinds of barriers as

²² Id.

²³ Id. at 10.

²⁴ Id.

²⁵ Id.

²⁶ Triennial Review Order at ¶443. The PA OCA recognizes that the Triennial Review Order has been reversed in part by USTA II. Nonetheless, the discussion regarding evidence of intermodal carriers and affiliates of non-Verizon ILECs when determining whether Section 251(c)(3) is satisfied remains valid.

new entrants without any facilities at all”²⁷ and that cable telephony does not provide “probative evidence of an entrant’s ability to access the incumbent LEC’s wireline voice-grade local loop and thereby self-deploy local circuit switches.”²⁸ Additionally, the evidence of record in the Pennsylvania TRO proceeding further reveals that cable telephony providers have the benefit of cable franchising agreements that would limit any new entrant’s ability to provide the same or similar competing service.

Furthermore, competitive affiliates of non-Verizon ILECs may also benefit from a base of revenue from their own incumbent territories that is protected from competitive forces as a result of the rural exemption provided to certain ILECs under Section 252 of TA-96. As such, these companies have benefitted from years of protection from any form of UNE competition within their own territory. Clearly, competitors who are affiliates of ILECs and have a protected source of revenues should not be considered when determining whether new entrants are impaired without access to the UNE-P in Verizon’s territory.

The evidence of record in the Pennsylvania TRO proceeding shows that the economics of competition are easier, for example, for a competitor who provides local exchange service through a cable network or that is an affiliate or subsidiary of another ILEC and uses ILEC switching, than for another CLEC that has no advantage related to affiliated cable or ILEC operations. The provision of local exchange service by these cable and ILEC affiliates reflects nothing about whether a CLEC is impaired without access to the UNE-P.

A review of the record evidence in the Pennsylvania TRO proceeding reveals that a significant amount of the data that Verizon Pennsylvania believed meets the Section 251(c)(3) standards is suspect and should be viewed cautiously because it does not accurately show that

²⁷ Id. at ¶98.

²⁸ Id. at ¶446.

new entrants would not be impaired without access to the UNE-P. When removing this suspect evidence, the statutory requirements of Section 251(c)(3) cannot be satisfied. As noted above, even the Schnierle Summary notes at the end of his Summary that “the information regarding the state of facilities based competition that may be gleaned from this record is interesting but limited.”²⁹ Given the significance of the issues at the heart of this proceeding, the PA OCA submits that the competitive alternative provided to hundreds of thousands of Pennsylvanians should not be jeopardized based on this “interesting but limited” information. Rather, such a decision must be made on substantial factual evidence. As discussed further below, there is no evidence to support removing the PA PUC’s ability to require ILECs to provide CLECs access to the UNE-P in Pennsylvania.

As such, the record evidence in the Pennsylvania TRO proceeding reveals that competitors in the mass market are impaired without the UNE-P.

3. The FCC Should Now Act To Define The Relevant Geographic Market As Density Cells 1-3 Within Metropolitan Statistical Areas To Ensure That CLECs Have Continued Access To The UNE-P In Verizon’s Territory In Pennsylvania.

In its NPRM, the FCC seeks comment on “how best to define relevant markets (e.g., product markets, geographic markets, customer classes) to develop rules that account for market variability and to conduct the service-specific inquiries to which USTA II refers.”³⁰ The NPRM notes the requirement under USTA II that an impairment analysis must account for specific characteristics of the market in which a particular requesting carrier operates.³¹ The PA OCA submits that the appropriate market definition in Pennsylvania is Density Cells 1-3 within

²⁹ Schnierle Summary at 19.

³⁰ NPRM at ¶9.

³¹ Id., citing, USTA II, at 575-577, 591-92.

Metropolitan Statistical Areas (“MSAs”)(hereinafter referred to as “density cells”).³² Upon review of the record evidence in the Pennsylvania TRO proceeding, it is clear that CLECs are impaired without access to UNE-P when analyzing the presence of facilities-based competition using this market definition. As such, the FCC should define the relevant market in Pennsylvania as density cells within MSAs.³³

The PA OCA submits that the relevant geographic market area must be defined in terms of where CLECs can economically compete. The geographic boundaries of the market should reflect those factors that affect the profitability of competitive entry. PA OCA witness Dr. Robert Loube³⁴ testified in the Pennsylvania TRO proceeding that:

factors such as retail rates and wholesale rates, economies of scale and sunk cost drive the profitability of entry and should be important attributes affecting the Commission’s determination. The PUC must focus on these conditions that allow new entrants the opportunity to establish long term profitability. At the same time, the markets should be as granular as possible, allowing the entrants to minimize their need to obtain large scale investments that might be beyond their ability to finance in the capital markets.³⁵

The PA OCA submits that the same considerations should be made by the FCC when making the determination as to the relevant geographic market in this proceeding. Overall, Dr. Loube testified that the market should be defined as Density Cells 1-3 in individual MSAs so that a competitive analysis does not remove the UNE-P in broad geographic areas where impairment

³² The PA OCA will tailor its responses specifically to conditions in Pennsylvania and will rely primarily on the evidence of record in the Pennsylvania TRO Proceeding.

³³ The PA OCA notes that its position is similar to the position taken by Verizon Pennsylvania in the Pennsylvania TRO Proceeding, with slight modifications.

³⁴ Dr. Robert Loube is the Director of Economic Research at Rhoads and Sinon, LLC. His consulting practice centers on providing expert advice to state agencies involved in telecommunications regulation. Prior to joining Rhoads and Sinon, Dr. Loube worked at the FCC, the Public Service Commission for the District of Columbia and the Indiana Regulatory Commission on issues associated with incremental cost, rate design, competition, universal service and separations. Dr. Loube received his PhD in Economics from Michigan State University in 1983.

³⁵ Pennsylvania TRO Proceeding at OCA St. 2 at 12-13.

continues to exist.³⁶ Essentially, Density Cells 1-3 reflect the urban centers and suburbs of Pennsylvania MSAs. Density Cells 1-3 do not reflect the more rural Cell 4 that is less dense and more difficult to serve.³⁷ OCA notes that a large portion of the Verizon service territory is contained within the rural Cell 4.

Furthermore, the FCC should consider that the revenue opportunities and market areas for CLECs in Pennsylvania are dependent on Verizon's UNE rates because a new entrant must generally charge less than Verizon to attract customers. Likewise, the relevant geographic market must be defined as large enough so that economies of scale can be realized. Sunk costs, such as costs of advertising and software that cannot be recovered when a carrier exits the market, should also be considered.

This is particularly true, as in Pennsylvania, where the UNE loop rates vary widely within the urban, suburban and rural areas within an MSA. As a result of the PA PUC approving Verizon Pennsylvania's recent UNE rate compliance filing,³⁸ the 2 wire basic unbundled loop rates in Pennsylvania are:

<u>Density Cell</u>	<u>Rate</u>
1	\$6.77
2	\$9.25
3	\$12.39
4	\$22.39

³⁶ Id. at OCA St. 1 at 13.

³⁷ A map showing Density Cells 1-4, Pennsylvania TRO Proceeding, Verizon St. 1.0, Att. 3, is attached as Appendix B. In the Pennsylvania TRO Proceeding, Verizon claimed impairment in Cells 1-3 in many of the Pennsylvania MSAs. The attached file shows Cells 1-3, color coded as red, orange and pink, where Verizon made a non-impairment claim. The large remaining yellow areas indicate Cell 4 with a few exceptions. In parts of the yellow areas, small cities in Cell 3 were present, but not color coded, as Verizon did not consider non-impairment to be taking place in those areas, e.g. York, Williamsport, State College, Altoona, Johnstown, Erie, etc. As Verizon made no claim in these Cell 3 areas, PA OCA would also claim impairment in those areas as well.

³⁸ Generic Investigation Re Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates, Docket No. R-00016683, Compliance Order (entered July 16, 2004).

As such, even where Cell 4 rate areas may be geographically close to Cells 1-3, the difference in UNE rates charged to CLECs vary dramatically, with a difference of 81% just between the density cell 3 rate and the density cell 4 rate alone.

Having considered these factors, and reviewing the record evidence in the Pennsylvania TRO Proceeding, it is clear that the most appropriate definition of a relevant geographic market is Density Cells 1-3 within MSAs. As Verizon's local retail rates are fairly consistent across density cells but UNE loop rates are not, competition in Cell 4 becomes difficult if not impossible.

Additionally, the relevant geographic area should not be defined as too large or too small. Ultimately, improperly defining the relevant geographic market may result in a finding of non-impairment where impairment exists, contrary to the intent of Congress in passing TA-96. For example, the entire MSA is not a relevant geographic market, as noted above, for purposes of determining whether or not CLECs are impaired because it does not provide a sufficient granular area for determination, e.g. it will include rural low density Cell 4 areas where the UNE loop rate is very high. However, the relevant geographic market should also not be so small as to fail to consider the economies of scale or CLEC marketing practices which are often done beyond individual density cell borders. Geographic markets that are too small may be impractical for purposes of conducting an impairment analysis under Section 251(c)(3). Within each MSA there are many density cells and it is quite possible that a CLEC could be impaired in one density cell within an MSA and not be impaired in another density cell within the same MSA.

As such, the PA OCA submits that there is substantial evidence of record in the Pennsylvania TRO Proceeding that supports defining the relevant geographic market as density

cells 1-3 within MSAs. This definition would allow a more accurate determination of whether competitors are impaired or not without access to the UNE-P, which is at the heart of this proceeding. The FCC should adopt the PA OCA definition of relevant geographic market for purposes of this proceeding throughout Verizon's territory in Pennsylvania.

4. It Is Necessary To Avoid Including Rural Areas Into A Market Definition Where Competitive Access Is Particularly Impaired.

As noted above, the rural Cell 4 areas are sufficiently remote from urban centers and carry such high UNE loop access rates that competitive access is impaired more so than in other areas of Pennsylvania. The PA OCA recommends a finding of mass market impairment for UNE switching for the residential market throughout Pennsylvania. However, such a finding is particularly appropriate in Cell 4.

Essentially, the OCA asserts that the FCC cannot avoid a finding of impairment given the high UNE loop rates and distance from urban centers in Cell 4 as listed above. OCA notes that, in the Pennsylvania TRO Proceeding, Verizon did not even claim non-impairment of mass market switching in Cell 4.³⁹ PA OCA emphasizes that the FCC should not extend the definitions of a market into rural Cell 4 and should make a finding of impairment in such markets as well.

5. CLECs Are Impaired Without Continued Access To The UNE-P In Verizon's Territory In Pennsylvania In The Relevant Geographic Markets.

a. Introduction.

In its NPRM, the FCC seeks comment, "including evidence at a granular level, on which specific network elements the Commission should require incumbent LECs to make available as UNEs in which specific markets, consistent with USTA II, and how the Commission

³⁹ Pennsylvania TRO Proceeding, Tr. 196-97.

should make these determinations.”⁴⁰ In response to this request, and in light of the relevant geographic market as discussed above, the PA OCA submits that the FCC must make a finding that CLECs are impaired for switching to serve the residential market without access to the UNE-P in Verizon’s territory in Pennsylvania. This determination is supported by the Schneirle Summary, as discussed above, as well as the record evidence presented in the Pennsylvania TRO proceeding. The FCC should allow the PA PUC the ability to require Verizon to provide CLECs with such access in Pennsylvania. Otherwise, the ability of hundreds of thousands of Pennsylvania consumers to purchase local telephone service from a competitive provider now and in the future will be jeopardized.

b. Actual CLEC Competition in the Residential Market Should Be Required to Support a Finding of Non-Impairment.

The FCC has previously found that, on a national scale, competitors are impaired without access to the UNE-P for residential customers.⁴¹ Now, in conducting a more granular analysis, the FCC must make a similar finding with regard to the relevant geographic markets in Verizon’s territory in Pennsylvania as evidenced, primarily, by the limited CLEC deployment of switches in the record in the Pennsylvania TRO proceeding. The PA OCA submits that it is critical to a finding of non-impairment under Section 251(c)(3) that there be evidence that multiple CLECs can economically compete in a given geographic market by providing their own switches before a finding of non-impairment be made with regard to that particular market.

Only proof of CLECs actively competing in a given geographic market that shows that such competitors can continue to provide alternative service should support a finding of non-impairment. The PA OCA notes that such competitive offerings do not have to be throughout the entire relevant geographic market (i.e., in every exchange in the density cell in the MSA) but

⁴⁰ NPRM at ¶11.

⁴¹ TRO at ¶459.

that such competitors should be actively providing alternative service in a majority of the geographic market. For example, a CLEC providing service to only two exchanges out of twenty in a geographic market should not be considered as actively competing in that market.

Additionally, the FCC must ensure that those CLECs are in fact providing service to residential customers and not business customers before making a finding of non-impairment for the UNE-P in the residential market. The fact that a CLEC may be serving the smaller, but more lucrative business portion of the market, does not provide evidence that carriers are not impaired in serving residential customers. Given the different retail pricing for services in these markets, competition in the small business market cannot be assumed to determine the potential for competition in the residential market.

The FCC should ensure that any CLECs are also serving more than a *de minimis* portion of the residential market. That is, a CLEC that provides service to only a small percentage of the residential market in a given geographic market may not actually support a finding of non-impairment in that market. Simply because some CLECs may be serving niche customers or providing special service to a limited customer base, such as extending a line to a corporate president at his or her residence, does not indicate that service is offered to the residential market.

c. Cable Company and ILEC Affiliate Competition Do Not Determine Non-Impairment for Other CLECs Without Such Advantages.

As discussed above, the PA OCA cautions against considering cable companies or competitive affiliates of ILECs in any determination that CLECs may or may not be impaired without access to the UNE-P in Verizon's territory in Pennsylvania. Cable companies and competitive affiliates of ILECs have distinct advantages. For example, cable companies have

first-mover advantages and economies of scale and scope not available to new entrants that lower the incremental costs of providing competitive telephone services. Cable companies often have the advantage of a franchise in the local geographic area and are able to use the cable facilities that are used for video programming to also transmit telephone service. Cable companies generally provide both their own switching and loops, given their cable franchise, and therefore the existence of a cable company providing telephone service provides no evidence of whether a CLEC is impaired without the UNE-P.

Competitive affiliates of ILECs have similar advantages, some of which may also be secured by monopoly protections that provide them with a secure base of ILEC telephone operations to expand into another company's territory. It is clear from the Pennsylvania record that ILEC affiliates often offer their CLEC telephone services by sharing a portion of their ILEC switch. New entrants have none of these advantages.

Therefore, when considering these issues, it is clear from a review of the record evidence submitted in the Pennsylvania TRO Proceeding that CLECs are impaired without access to the UNE-P in Verizon's territory in Pennsylvania. As noted in the Schneirle Summary, the detailed information provided in Exhibits ALJ-1 through 17 supports such a finding. In particular, the Schneirle Summary provides

On balance, except for the PECO-TelCove and Adelphia cable issues, the failure of Verizon to identify residential as opposed to business lines, and the extent to which it includes DS0's [one voice channel] provided to enterprise customers, Exhibit 1 to Verizon's Main Brief appears to be a reasonably accurate "snapshot in time" of the non-enterprise lines served by other than Verizon switching. Reference to the responses of the Footnote 14 CLECs to the Commission's interrogatories (Exhibits ALJ-1 through 17) provides some information on the residential/business question. Generally speaking, there appear to be only four companies that are providing facilities based service to residential customers (of greater than *de minimis* numbers of lines). Comcast in the

Pittsburgh area and RCN in the Philadelphia area are serving substantial numbers of residential customers using cable telephony. CTSI and CEI are serving much smaller, but not insignificant, numbers of customers, apparently using the switches of their ILEC parents in conjunction with Verizon loops. Notwithstanding Verizon's claims, I do not believe that Adelphia, the cable company, is providing local exchange service. The number of lines attributed by Verizon to Adelphia is extremely small, suggesting that they may be from a trial of some sort that may or may not be active.⁴²

As ALJ Schneirle explained, Verizon's assertions that Adelphia and Telcove serve residential must be dismissed. The remaining significant competitors are either cable companies or ILEC affiliates. Competition from these companies does not indicate a competitive market. In light of this statement in the Schneirle Summary, it is clear that there does not exist a sufficient presence of facilities-based competitors in Verizon's territory in Pennsylvania to warrant a finding of non-impairment for the UNE-P.

In other words, it is clear that new entrants are impaired without access to the UNE-P in the mass market as the Schneirle Summary states that, based on the responses of 17 CLECs, there are only four companies that are providing facilities based service to residential customers, and two of those CLECs are cable companies and two are competitive affiliates of ILECs. A further review of the record evidence in the Pennsylvania TRO proceeding also supports this statement. Therefore, the FCC must allow the PA PUC to continue to require Verizon to provide CLECs with access to the UNE-P in Pennsylvania.

d. Verizon Ex Parte Filing.

Finally, the PA OCA notes that Verizon made an ex parte filing to the FCC on June 24, 2004 wherein the company contended that, "with respect to mass-market switching,

⁴² Schneirle Summary at 12.

developments since the TRO have rendered many of the debates increasingly academic.”⁴³

Verizon further stated that “cable companies now offer local telephone service” and “wireless carriers have continued to make substantial gains at the expense of mass-market wireline service.”⁴⁴ Most notably, however, Verizon’s Ex Parte filing includes attachments that provide aggregated data regarding the alleged presence of CLEC switches and CLEC customers within Verizon’s top MSAs, including the Philadelphia MSA, the Pittsburgh MSA and the Allentown-Bethlehem-Easton MSA in Pennsylvania.

The PA OCA submits that Verizon’s Ex Parte filing is likewise insufficient to support a finding that CLECs are not impaired without access to the UNE-P in the relevant geographic markets in Pennsylvania. In particular, Verizon’s Ex Parte filing does not sufficiently describe the CLEC presence it allegedly shows because the data is provided in an aggregated basis. Without specifically identifying which CLECs are providing service where, and to how many customers, it is impossible to verify this information. For example, without more specific data it would be impossible to see whether the Verizon Ex Parte filing suffers from the same flaws that its data in the Pennsylvania TRO Proceeding suffered from: is Verizon including lines of large business customers in their total count? does Verizon count DSOs sold to enterprise customers as part of the mass market? are the CLECs actively providing service throughout the entire geographic market area? is there more than a de minimis presence? are any of these lines served by affiliates of ILECs? A plain reading of the Verizon Ex Parte shows that it already suffers from the same flaw in relying on the presence of cable telephony

⁴³ Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, CC Docket No. 01-338; Ex Parte (letter from Dee May, Verizon Vice-President, Regulatory to Marlene Dortch, Secretary, Federal Communications Commission)(June 24, 2004)(“Verizon Ex Parte”).

⁴⁴ Id. at 2.

competition which, as discussed above, cannot be used to show whether new entrants are impaired without access to the UNE-P.

The PA OCA has recently become aware of the Verizon Ex Parte filing and, in particular, its accompanying attachments that were not available through the FCC website. As such, the PA OCA has not been able to fully consider its significance. The PA OCA, however, may further respond to this data in Reply Comments as well as any other data that Verizon may provide in support of its assertion in its Comments alleging that it should no longer be required to provide CLECs with access to the UNE-P in Pennsylvania.

e. Conclusion.

As such, the FCC must now make a finding that CLECs are impaired without continued access to the UNE-P in Verizon's territory in Pennsylvania as applied to the relevant geographic markets. There is no evidence of record, either in the Pennsylvania TRO proceeding or elsewhere, that reveals that CLECs are not impaired without access to the UNE-P.

6. The FCC Should Now Clarify That Verizon In Pennsylvania Has Independent Section 271 Unbundling Obligations Apart From Its Obligations Under 251.

In its NPRM, the FCC seeks comment on how to respond to USTA II and “how various ILEC service offerings and obligations, such as tariffed offerings and BOC [Bell Operating Company] section 271 access obligations, fit into the Commission’s unbundling framework.”⁴⁵ The PA OCA submits that Verizon must adhere to its Section 271 requirements and continue to provide UNE-P to CLECs as a UNE because the requirements under Section 271 are separate and apart from the requirements under Section 251. As such, the FCC should now

⁴⁵ NPRM at ¶9; *see also*, fn. 38 (“the FCC further seeks comment on whether independent section 271 unbundling obligations need to be clarified or modified in light of USTA II”).

clarify that Verizon in Pennsylvania has an independent Section 271 unbundling obligation apart from its obligations under Section 251.

This determination is well-supported in the discussion provided by the FCC in the Triennial Review Order which specifically articulates the independent access obligations for Verizon created in Section 271 of TA-96. There, the FCC stated

we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loop, switching, transport and signaling regardless of any unbundling analysis under section 251. [T]he plain language and the structure of 271(c)(2)(B) establish that BOCs have an independent and ongoing access obligation under section 271. ... Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2.⁴⁶

The FCC continued, “it is reasonable to interpret section 251 and 271 as operating independently. Section 251, by its own terms, applies to *all* incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs.”⁴⁷ The FCC also specifically rejected Verizon’s claim that any interpretation of section 271 that recognizes its independence from section 251 would improperly single out BOCs for treatment different from other incumbent LECs.⁴⁸ The FCC’s reasoning remains true today.

The interplay between section 251 and section 271 of TA-96 is particularly important given Verizon Pennsylvania’s ability to enter the long distance market under section 271 in exchange for it complying with several market opening provisions, such as providing competitors access to certain elements of its network. The FCC granted Verizon permission to provide long distance services in Pennsylvania after a showing that it had taken the statutorily-

⁴⁶ Triennial Review Order at ¶¶ 653-654.

⁴⁷ Id. at ¶655 (emph. in original).

⁴⁸ Id.

prescribed steps to open its local exchange market to competition.⁴⁹ Therefore, Verizon must continue to meet its obligations under section 271 as part of its ability to provide long distance services.

Verizon PA's ability to offer UNE-P was an integral part of the PA PUC recommending, and the FCC approving, Verizon's application to offer interLATA long distance service in Pennsylvania. Clearly, Verizon's unbundling in order to allow CLECs access to the UNE-P was one of the unbundling requirements reviewed and required by the FCC Verizon PA 271 Order.⁵⁰ Thus, UNE-P unbundling was one of the Verizon requirements upon which Verizon's long distance opportunities were based. Verizon continues to enjoy the opportunity to offer long distance service within Pennsylvania. It is also fair, and legally required, that Verizon must continue to offer the unbundling service that was the key to its long distance authority.

As such, in addition to Verizon's unbundling obligations pursuant to section 251, Verizon Pennsylvania also has other obligations to provide UNE-P to CLECs. Therefore, even if Verizon no longer has an obligation to provide UNE-P to CLECs under Section 251, Verizon still has the obligation to provide such access to competitors under Section 271. The PA OCA submits that the FCC should now clarify that Verizon in Pennsylvania has independent Section 271 unbundling obligations apart from its obligations under 251.

7. Impairment Exists Because Verizon's Proposed Batch Hot Cut Process Is Speculative And Untested And Does Not Effectively Eliminate Hot Cut Impairment.

⁴⁹ Application of Verizon Pennsylvania, Inc. for Authorization to Provide In-Region InterLATA Services in Pennsylvania, CC Docket No. 01-138, Memorandum Opinion and Order, FCC 01-269, at ¶¶ 76 and 78 ("271 Order").

⁵⁰ 271 Order at ¶ 76.

a. Introduction

In the TRO, the FCC required state commissions to resolve a fundamental problem of eliminating UNE-P – that of the insurmountable disadvantages imposed by the ILEC hot cut processes. In Pennsylvania, this issue resides primarily with the Verizon companies, and Verizon has suggested two theoretical solutions to relieve this impairment – that of the process hot cut and the batch hot cut. At this point, it is entirely speculative as to whether these processes will do what Verizon claims; indeed, it is questionable as to whether they are feasible at all.

The hot cut process involves a considerable synchronization of carriers, technicians, computers, and alterations in the physical signal path of each local loop subject to it.⁵¹ It is neither simple nor expedient in its current form, and is a great impairment within itself.⁵² For this reason, the FCC has turned to the states to find a way to alleviate that impairment.

Hot cut impairment is a fundamental issue in any discussion of UNE- based competition, and regardless of the long-term implications of hot cut impairment, the one-time implications are a serious threat to Pennsylvania's local telephone services market. For example, if CLECs would no longer have access to unbundled circuit switching, in excess of 444,000 individual hot cut operations would be required to convert CLEC customers from UNE-P to UNE-L based CLEC service. Pennsylvania TRO Proceeding, OCA St. 1 at 43. Given the problems inherent in the hot-cut process, as discussed below, it is unlikely that Verizon could accomplish such a massive undertaking without causing serious disruptions to the telephone service of those Pennsylvania consumers who have chosen a competitive local service provider.

⁵¹ Triennial Review Order ¶ 464-65.

⁵² Triennial Review Order ¶ 475.

Pennsylvania TRO proceeding, OCA St. 1 at 43. For these reasons, it is particularly important that the FCC proceed carefully regarding hot cuts, with full deliberation of all the issues presented here. The PA OCA points out that Pennsylvania only recently initiated its batch hot cut proceeding, and as of yet has not arrived at any conclusion regarding the efficacy of Verizon's proposals.

b. The Pennsylvania Commission Has Yet To Employ Its Fact-Finding Expertise To Eliminate Hot Cut Impairment.

The FCC made the following conclusions regarding the impairment imposed by the current hot cut processes employed by incumbent LECs:

The record shows that hot cut capacity is limited by several factors, such as the labor intensiveness of the process, including substantial incumbent LEC and competitive resources devoted to coordination of the process, the need for highly trained workers to perform the hot cuts, and the practical limitations on how many hot cuts the incumbent LECs can perform without interference or disruption.

...

The record contains evidence that hot cuts frequently lead to provisioning delays and service outages, and are often priced at rates that prohibit facilities based competition for the mass market.¹⁴¹¹ The barriers associated with the manual hot cut process are directly associated with incumbent LECs' historical local monopoly, and thus go beyond the burdens universally associated with competitive entry.

...

Our finding concerning operational and economic barriers associated with loop access reflects these significant differences between how the incumbent LEC provides service and how competitive LECs provide service using their own or third-party switches.⁵³

The FCC also added:

Competitive carriers contend that the current hot cut process prevents an orderly and seamless migration, at least with respect to mass market customers. Requesting carriers must wait for coordinated cut overs before providing service with their own switch, delay that prevents the competitive LEC from providing service in a way that mass market customers have come to expect. Service disruptions also will influence customer perceptions of competitive LECs' ability to provide quality service, and thus affect competitive LECs' ability to attract

⁵³ Triennial Review Order ¶ 465.

customers. Competitive LECs, like ATX, provide ample testimony in the record reporting on their efforts to serve mass market locations using the hot cut process, claiming that they were forced to cease marketing and discontinue plans to provide switch-based services to mass market customers because they experienced difficulties with service implementation associated with the hot cut process to connect voice-grade loops to their switches. Similarly, AT&T contends that it lost over one-half of its UNE-L customers before the customers were even cut over due to the impact the hot cut process had on customers.¹⁴¹⁸ AT&T also states that it experienced so many problems with coordinated hot cuts used to connect loops to its switches that it “was forced to stop marketing its switch-based service to all customer locations that did not have enough traffic to warrant the use of a DS-1 or higher capacity loop.”⁵⁴

From all this, the FCC concluded that:

the operational and economic barriers arising from the hot cut process create an insurmountable disadvantage to carriers seeking to serve the mass market, demonstrating that competitive carriers are impaired without local circuit switching as a UNE. Although we find that current conditions at the national level demonstrate that competitive LECs are impaired without unbundled switching for mass market customers based on the costs and delays associated with hot cuts, we take affirmative steps to reduce this impairment and promote an environment suitable for increased facilities-based competition. As described below, we find that the present impairment can be mitigated by an improved loop provisioning process.⁵⁵

...

We have found on a national basis that the delays and costs associated with loop provisioning – those specifically arising from the hot cut process – impair a requesting carrier’s entry into the mass market. Above, we have directed the state commissions to implement batch cut processes to reduce the economic and operational barriers posed by the present hot cut process. We recognize, though, that even after such processes are implemented, competitive carriers may face barriers associated with loop provisioning – even problems arising from the newly improved hot cut processes – which may continue to impair a requesting carrier’s entry into the mass market.⁵⁶

The evidence before the Commission clearly indicated that hot cut impairment exists. The OCA points out that the USTA II vacatur of the FCC’s finding of nationwide impairment does not establish that hot cut impairment does not exist at the state level. USTA II at 19-21. Indeed, the

⁵⁴ Triennial Review Order ¶ 466 (citations omitted).

⁵⁵ Triennial Review Order ¶ 475 (citations omitted).

⁵⁶ Triennial Review Order ¶ 512.

USTA II vacatur is limited to the finding of nationwide impairment. The PA OCA submits that Pennsylvania's local exchange service markets do in fact suffer from hot cut impairment, and the Pennsylvania Commission's current loop migration proceeding, discussed below, was instituted to develop possible solutions to the problem of hot cut impairment.

While the FCC declined to provide specific proposals concerning how an improved loop provisioning process may mitigate hot cut-based impairment, it was confident that the states could do so through their local fact-finding expertise and that the states could construct solutions best suited to local markets.⁵⁷ The FCC was confident that the states, through their fact-finding expertise could develop hot-cut solutions best suited to local markets.⁵⁸ To that end, the FCC directed state Commissions to approve a batch hot cut process that would ameliorate the insurmountable operational and economic disadvantages imposed by the existing hot-cut process. In the Triennial Review Order, (codified at 51.319(d)(2)(ii)),⁵⁹ the FCC specifically directed state commissions to discover and approve a low-cost batch cut process to mitigate the impairment imposed by the current hot cut process in each commission designated market.⁶⁰

The PA Pennsylvania PUC took action to develop a resolution of the loop migration issue in the proceeding Development of an Efficient Loop Migration Process.⁶¹ Further on-the-record hearings have been scheduled on these issues and further proceedings are likely.

⁵⁷ Triennial Review Order ¶ 488.

⁵⁸ Triennial Review Order ¶ 488.

⁵⁹ See Part 51 of Title 47 of the Code of Federal Regulations.

⁶⁰ Triennial Review Order ¶ 488.

⁶¹ Development of an Efficient Loop Migration Process, Docket No. M-00031754, Procedural Order at 25 (October 3, 2003)(PA Loop Migration Proceeding).

This protracted schedule has resulted in part because interested parties in Pennsylvania hoped to use the New York Public Service Commission batch hot cut proceeding as a basis for the Pennsylvania proceeding. New York issued its Order Setting Permanent Hot Cut Rates on August 25, 2004. Proceeding on Motion of the Commission to Examine the Process and Related Costs of Performing Loop Migrations on a More Streamlined (e.g., Bulk) Basis, Case No. 02-C-1425, Order Setting Permanent Hot Cut Rates (August 25, 2004) (NY Hot Cut Order).

The PA OCA points out that the stated purpose of the NY Hot Cut Order is to set hot cut rates, and does not complete the New York hot cut proceeding. NY Hot Cut Order at 69. For example, the New York Public Service Commission has yet to develop performance metrics, and neither the Batch Hot Cut nor the Process Hot Cut methodology has yet to see practical implementation in New York. As such, little practical process has occurred to resolve hot cut impairment issues.

c. Important Aspects of the Loop Migration Process Remain Unresolved; Verizon Has Not Demonstrated a Viable Solution To Hot Cut Impairment.

The Pennsylvania Commission determined that information submitted in response to the off-the record proceeding is not to be automatically incorporated into the current on-the-record proceeding. Thus, the Pennsylvania Commission has not gathered any substantive information regarding Verizon's proposed Process or Batch Hot Cut methodologies.

The PA OCA has reviewed the information provided by Verizon in the Pennsylvania PUC's proceeding. However, PA OCA witness Rowland Curry testified that Verizon has yet to test, implement, or verify the efficacy of its proposed batch hot cut process. Pennsylvania TRO Proceeding at OCA St. 1 at 49. Thus, no solution to hot cut impairment has

been identified. Regarding Verizon’s testing process, Mr. Curry pointed out that Verizon states “[t]he full scale and methodology of the proposed batch hot cut trial has not yet been determined nor has Verizon completed its review of the potential trial participants.”⁶² Pennsylvania TRO Proceeding at OCA St. 1 at 49 *quoting* Verizon response to OCA Set II, Interrogatory 3. Mr. Curry explained that, while the Commission should continue to encourage dialogue among the parties as to the implementation of this process, it should not rush to approve such a process unless Verizon shows that it actually works for customers. OCA St. 1 at 49.

Addressing the issue of Verizon’s performance monitoring of this process, Mr. Curry pointed out “... no metrics exist for the proposed batch hot cut process.”⁶³ Mr. Curry also pointed out that Verizon did not produce a firm proposal, implementation plan, performance monitoring metrics, or other details of the new batch hot cut process; here, it produced only speculation. OCA St. 1 at 50. The PA OCA submits that the Commission cannot determine that local circuit switching is not impaired until the batch hot cut issue is resolved via a demonstration of a lack of impairment. Given the large numbers of consumers placed at risk by Verizon’s proposal, the FCC should not simply hope that Verizon can turn an inherently flawed process into a highly functional one without proper process testing and monitoring for a reasonable time. The Commission should not approve Verizon’s proposal based on Verizon’s proffer of speculation and scant evidence.

PA OCA witness Curry explained that there are serious problems regarding Verizon’s ability to perform hot cuts in general, and in its ability to perform hundreds of thousands of hot cuts in short order as proposed by Verizon here. Pennsylvania TRO Proceeding at OCA St. 1 at 43. The FCC’s conclusions agree with Mr. Curry. The FCC found “that it is

⁶² Pennsylvania TRO Proceeding at Verizon response to OCA Set II, Interrogatory 3.

⁶³ Pennsylvania TRO Proceeding at Verizon response to OCA Set II, Interrogatory 4.

unlikely that incumbent LECs will be able to provision hot cuts in sufficient volumes absent unbundled local circuit switching in all markets.”⁶⁴ The significant “issue identified by the record is an inherent limitation in the number of manual cut overs that can be performed, which poses a barrier to entry that is likely to make entry into a market uneconomic.”⁶⁵

Mr. Curry agreed with the TRO’s list of factors contributing to the limited capacity of the current hot cut process. Pennsylvania TRO Proceeding at OCA St. 1 at 45. Specifically, Mr. Curry agreed with the FCC’s conclusions that “the labor intensiveness of the process, including substantial incumbent LEC and competitive resources devoted to the coordination of the process, the need for highly trained workers to perform the hot cuts, and the practical limitations of how many hot cuts an incumbent LEC can perform without interference or disruption” serves to limit a LEC’s ability to perform hot cuts.⁶⁶

The delays imposed by the existing hot cut process, and Verizon’s proposed Batch Hot Cut process are a serious issue. For example, regarding anticipated hot cut volume and proposed scheduling, Verizon provides:

“...with the appointment window of 6 to 26 business days for batch hot cuts, Verizon will have a better view of the orders that have been submitted. This will give Verizon more flexibility in planning its work force to ensure that the orders are all completed within the batch hot cut window.”⁶⁷

The PA OCA urges the FCC to examine the scheduling issue very carefully. As Mr. Curry testified, Verizon’s 5-week delay in service constitutes a serious barrier within itself, and may well cause residential customers to avoid competitive service providers altogether. Pennsylvania TRO Proceeding at OCA St. 1 at 50. Indeed, the FCC looked to the problem of delay – a cause

⁶⁴ Triennial Review Order ¶ 468.

⁶⁵ Triennial Review Order ¶ 469.

⁶⁶ Triennial Review Order ¶ 465.

⁶⁷ Pennsylvania TRO Proceeding at Verizon response to OCA Set II, Interrogatory 6.

of AT&T and ATX's withdrawal from markets – to determine that hot cut impairment existed in the first instance.⁶⁸ These delays not only interfere with CLEC efforts to develop and market competitive options, but they also prevent consumers from realizing the benefit of their bargain.

Mr. Curry is correct to point out that the Commission should ensure that Verizon performs all aspects of the hot cut process with parity to its own provision of service. Pennsylvania TRO Proceeding at OCA St. 1 at 50. Currently, Verizon must perform 95% of all primary service order installs within 5 working days of the receipt of that order. 52 Pa. Code § 63.58. Imposing a five-week delay for CLECs clearly places them at a disadvantage to an ILEC's five-day minimum. As Mr. Curry pointed out, the circumstance of delay is particularly troubling regarding customers in wire centers away from high-density urban wire centers where even the best batch hot cut process may constitute a barrier to entry if a lone customer must wait until other customer orders accumulate over time for batch processing. Pennsylvania TRO Proceeding at OCA St. 1 at 50.

The NY Hot Cut Order noted that delay is an issue, and also noted Verizon New York offered to provide a "UNE-P-like" service as an interim measure.⁶⁹ The New York Hot Cut Order does not address the specifics of this proposal. While the PA OCA believes that the transition period should be shorter than Verizon's 26-day recommendation, the OCA nevertheless believes that a transitioning measure of this type is appropriate. While the NY Hot Cut Order did not provide any detail regarding this process, the TRO discussed this issue in some detail. It provides:

⁶⁸ Triennial Review Order ¶ 466 (citations omitted).

⁶⁹ Verizon addresses its "UNE-P-Like" service in its Initial Post-Hearing Brief in New York's Proceeding on Motion of the Commission to Examine the Process and Related Costs of Performing Loop Migrations on a More Streamlined (e.g., Bulk) Basis, Case No. 02-C-1425. There it claims that it will price this service at currently applicable UNE-P rates, and will provide the service for the duration of the order holding period. Verizon Initial Post-Hearing Brief at 45.

We note at the outset that in at least some cases, “rolling” access to unbundled local circuit switching could adequately address certain barriers to entry associated with the switching element.

...

Because the evidence in the record demonstrates that the provisioning delays caused by the manual hot cut process may place new entrants at a significant competitive disadvantage relative to the incumbent LECs, which are able to offer service to customers immediately after they receive a customer’s order, we find that the availability of unbundled local circuit switching – even on a temporary basis – may enable competitors to acquire customers, aggregate them, and migrate them to the carrier’s own switch in a manner that would not be feasible if the customers each had to be migrated individually upon signing up with the competitive LEC.⁷⁰

In light of the prospect that rolling access to unbundled local circuit switching could permit requesting carriers to compete when they otherwise would have been impaired without access to the switching element, we require states to consider and to mandate such rolling access when appropriate, as described here.⁷¹

The FCC also suggested that a 90-day period of transition may be appropriate, and allowed the states to develop longer transitioning windows if appropriate.⁷² The OCA suggests that even 26 days, or five weeks, is too long a time for a transitioning period as it is unreasonable to deny consumers the benefit of their bargain for that long. At the end of a five week period, let alone 90 days, consumers may forget about the change, become frustrated with the delay (causing churn), or otherwise believe they have been slammed.

All these serious unresolved problems show that the hot cuts remain an unresolved issue. It is imperative the FCC carefully consider the inherent limitations of Verizon’s proposals in this proceeding before it makes any determination regarding the elimination of UNE-P.

⁷⁰ Triennial Review Order ¶ 523 (citations omitted).

⁷¹ Triennial Review Order ¶ 524 (citations omitted).

⁷² Triennial Review Order ¶ 524 (citations omitted).

8. Conclusion

Hot cut impairment is fundamental to the issue of UNE-based competition, and these issues cannot be resolved without carefully considering its impact. At issue is the now-reliable telephone service of over 444,000 Pennsylvania consumers. Given the problems inherent in the current hot-cut process, and the serious questions of fact presented by Verizon's proposed batch hot cut process, it is particularly important that the FCC proceed carefully regarding batch hot cuts. In addition, it is also clear that in Pennsylvania, there has been little progress regarding this issue.

III. CONCLUSION

WHEREFORE, the Pennsylvania Office of Consumer Advocate respectfully submits that the Federal Communications Commission consider these Comments when acting on the Notice of Proposed Rulemaking in the above-referenced proceeding. In particular, the PA OCA submits that the FCC should continue the use of the UNE-P in the residential mass market in Pennsylvania.

Respectfully submitted,

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Dated: October 4, 2004
80927

APPENDIX A

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligation
of Incumbent Local Exchange
Carriers to Unbundle Network Elements

I-00030099

DOCUMENT
FOLDER

SUMMARY OF THE RECORD EVIDENCE

Before
Michael C. Schnierle
Administrative Law Judge

HISTORY OF THE PROCEEDINGS

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This proceeding is an outgrowth of the Federal Communication Commission's *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order (rel. Aug. 21, 2003)(FCC 03-36), as corrected by errata, FCC 03-227 issued on September 17, 2003. (hereinafter "Triennial Review Order" or "TRO"). To put the balance of the discussion in this case into context, it is useful to quote from the Commission's order establishing this proceeding:

In 1996, Congress adopted a national policy of promoting local telephone competition through the enactment of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. §§151, *et seq.* (TA-96). TA-96 relies upon the dual regulatory efforts of the Federal Communications Commission (FCC) and its counterpart in each of the states, including this Commission, to foster competition in local telecommunications markets by establishing broad interconnection, resale, and network access requirements designed to facilitate multiple modes of entry. To this end, Section 251 of TA-96 requires, among other things, an Incumbent Local Exchange Carrier (ILEC) to provide Competitive Local Exchange Carriers (CLECs) with non-discriminatory access to its network elements on an unbundled basis. *See* 47 U.S.C. §251(c)(3).

In determining what ILEC network elements are to be made available to CLECs on an unbundled basis, TA-96 provides that the FCC, at a minimum, must consider whether access to such unbundled network elements that are proprietary in nature is necessary and whether the failure to provide the unbundled network element would impair the ability of a CLEC to provide the retail services it seeks to offer. 47 U.S.C. §251(d)(2)(A) and (B). Initially, the FCC defined impairment so as to require unbundling if "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative form from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer." *Implementation of the Local Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3725 (1999) (*UNE Remand Order*).

Under this "impairment" standard, the FCC required that an ILEC provide unbundled access to the following network elements on a nationwide basis in each geographic market: (1) loops (including dark fiber and high-capacity); (2) subloops; (3) network interface devices; (4) local circuit switching; (5) packet switching under certain circumstances (6) interoffice transmission facilities (including dark fiber); (7) signaling networks and call-related databases; and (8) operations support systems. *UNE Remand Order*, 15 FCC Rcd at 3771-3890. The FCC then added the high frequency portion of the loop to this list of UNEs that an ILEC must offer. *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*).

The *UNE Remand Order* also established that the FCC would revisit these unbundling rules every three years. *UNE Remand Order*, 15 FCC Rcd at 3766. In December of, 2001, the FCC released a Notice of Proposed Rulemaking (*NPRM*) initiating its first triennial review of its policies regarding unbundled network elements. *Review of the Section 251 Unbundling Obligations of Local Exchange Carriers*, CC Docket No. 01-338, et al., Notice of Proposed Rulemaking, FCC 01-361 (rel. December 20, 2001).

Meanwhile, sundry ILECs and the United States Telecom Association (USTA) filed an appeal of the FCC's *UNE Remand* and *Line Sharing* orders in the United States Court of Appeals for

the District of Columbia Circuit. On May 24, 2002, the D.C. Circuit Court remanded the FCC's unbundling rules established in the *UNE Remand Order*. *United States Telecom Ass'n v. Fed. Communications Comm'n*, 290 F.3d 415 (D.C. Cir. 2002), cert. denied, *WorldCom, Inc. v. United States Telecom Ass'n*, 155 L. Ed. 2d 344, 123 Sup. Ct. 1571 (2003). However, because the *UNE Remand Order* was not vacated, the FCC's unbundling rules for network elements were to remain in effect while the FCC re-examined its rules. In addition, the Court also vacated and remanded the FCC's *Line Sharing Order*. *Id.*

On February 20, 2003, the FCC adopted new rules concerning an ILEC's obligation to make UNEs available to competing carriers. On August 21, 2003, the FCC released its long-awaited *Triennial Review Order* that it adopted six months earlier on February 20. In the *Triennial Review Order*, the FCC adopts rules which establish a new standard for determining the existence of impairment under section 251(d)(2) of TA-96 and sets forth a new list of unbundled network elements (UNEs). Additionally, the FCC applies its unbundling analysis to individual elements in a more granular manner than before. Under this more granular approach, impairment varies by geographic location, customer class, and service, including a consideration of the type and capacity of the facilities to be used.

....

The purpose of this Procedural Order is to provide details regarding the process and procedure that will be used to implement the FCC's *Triennial Review Order*. This Procedural Order will serve as a guide by which the Commission will gather the information necessary to make its determination and set up the proceedings. The Commission also reserves the right to adjust the processes and procedures, as may be needed. (Footnotes omitted).

....

In the *Triennial Review Order*, the FCC also provides that within 9 months of the effective date of the order (i.e., by June 2, 2004), state commissions may conduct a granular analysis to determine whether ILECs in that state must continue to provide access to certain network elements. To this end, the Commission must determine whether ILECs in Pennsylvania must continue to provide competing carriers with access to: (1) mass market high-

capacity loops; (2) mass market switching; and (3) dedicated transport.

Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Network Elements, Docket No. I-00030099 (Order entered October 3, 2003) at 1-4, 11. This proceeding was thus convened to determine whether CLECs were impaired, according to the standards set forth in the *TRO*, without access to mass market switching, dedicated transport, and mass market high-capacity loops.

Two other points are worth noting now. First, the Commission explicitly placed the burden of proof on an ILEC (Verizon here) seeking a finding of non-impairment. *Id.* at 12. Second, recognizing that some CLECs might choose not to participate, and recognizing that time was of the essence in obtaining certain critical information, the Commission directed certain CLECs to provide answers to certain questions at the outset of the proceeding, and regardless of whether they actually intended to participate. Those CLECs were listed in footnote 14 of the Commission's order and became known as the "Footnote 14 CLECs." They include the following: AT&T Communications of Pa., Inc.; Adelphia Business Solutions of Pa., Inc.; Allegiance Telecom of Pennsylvania, Inc.; ATX Licensing, Inc.; Cavalier Telephone Mid-Atlantic; CEI Networks, Inc.; Choice One Communications of Pa., Inc.; Comcast Phone of Pennsylvania; CTSI Incorporated, Inc.; CTC Communications Corp.; Focal Communications Corporation of Pa.; Intermedia Communications, Inc.; Level 3 Communications; MCI WorldCom Communications, Inc.; MCImetro Access Transmission Services, LLC; Metro Teleconnect Companies, Inc.; PECO Hyperion Telecommunications; Penn Telecom; RCN Telecom Services, Inc.; RCN Telecom of Phil.; Sprint Communications Company, LP; Talk America, Inc.; TCG Delaware Valley, Inc.; TCG Pittsburgh; XO Pennsylvania, Inc.; and Z-Tel Communications Inc., LLC.

On October 31, 2003, Verizon Pennsylvania, Inc. filed a petition to initiate this proceeding. Later it was clarified that the petition was intended to include Verizon North, as well as Verizon Pennsylvania. Henceforth, both companies will be referred to as "Verizon." Hearings were held and briefs were filed.

After the briefs were filed, the DC Circuit Court of Appeals overturned the *TRO* in certain critical respects. *United States Telecom Assoc. V. Federal Communications Commission*, 359 F.3d 554; 2004 U.S. App. LEXIS 3960 (DC Circuit, 2004) ("*USTA*"). Specifically, the Court vacated the FCC's delegation to the state commissions of the power to make determinations regarding whether CLECs would be impaired without access to unbundled mass market switching, and dedicated transport. *USTA*, 359 F. 3d at 568. It appears that the Court viewed high capacity loops as a subset of "dedicated transport." The Court also vacated the FCC's impairment decisions with respect to mass market switching and dedicated transport (DS1, DS3 and dark fiber—apparently including high capacity loops). *USTA*, 359 F. 3d at 594. Consequently, this proceeding lost any *raison d'etre*. The Court ultimately stayed this decision until June 15, 2004. On June 15, 2004, the stay expired, and with it the FCC's rules.

On March 25, 2004, with notice to the parties, the Commission suspended activity in this proceeding. On June 3, 2004, the Commission, by Secretarial Letter, notified the parties as follows:

All parties are hereby notified that the Commission has directed OALJ to prepare a summary of the record evidence, as the next step in this proceeding. The Commission anticipates that such summary will be useful to the Commissioners and staff, despite the legal uncertainty surrounding the *TRO*. At a minimum, the summary will enhance the Commission's understanding of the presence of facilities-based competition in Pennsylvania today.

The summary will recite the party positions on each issue and provide any other useful information, such as explain points of debate among the parties as to alternative sources of facilities or explain why there are uncertainties as to what facilities exist to serve customers. It will summarize what the record shows as to the existence of alternative (non-Verizon) switches, transport and high capacity loops on a geographic basis to serve wireline customers.

The summary of the record will not be a Recommended Decision because it will not be written to the Federal Communications Commission's legal standards promulgated in the Triennial Review Order.¹ For example, the assigned AU will not decide how the Commission should define "geographic market." Accordingly,

exceptions and replies will not be required. The summary will be a public document, however, that will be subject to comment by the parties. (Footnote omitted.)

Since issuance of the Commission's letter, the stay of the Court's order has expired, and with it the FCC's unbundling rules and delegation of responsibility to the state commissions. For that reason, this summary will focus on the presence and use of competitive facilities, rather than on the extent to which those facilities may demonstrate lack of impairment under the FCC's vacated rules. To some extent, the FCC's standards will be discussed simply because those standards dictated, in part, the evidence that was produced.

While not, strictly speaking, background for this proceeding, I am reproducing here two tables from a textbook on digital telephony. There is much mention in this record of terms such as DS-0, DS-1, DS-3 and OC_n (where n may be certain integers). These abbreviations refer to the transmission rates of certain telephone facilities. I am including the following tables in an attempt to clarify for the reader the meaning of these terms. "SONET" is an acronym for synchronous optical network. Where the term "OC_n" appears in this Summary or the parties' briefs, etc., it refers to a high capacity circuit of the OC type; the "n" is a placeholder meaning any integer that describes one of the OC levels of capacity, e.g., OC-12 or OC-48.

Table 1-1 Digital Hierarchy

DIGITAL SIGNAL LEVEL	BIT RATE	EQUIVALENT 4 kHz VOICE CHANNELS ^a	TYPICAL TRANSMISSION MEDIA ^b
DS-0	64.00 kbps	1	TP
DS-1	1.544 Mbps	24	TP
DS-1C	3.152 Mbps	48	TP
DS-2	6.312 Mbps	96	FO, RD, CX
DS-3	44.736 Mbps	672	FO, RD, CX
DS-4	274.176 Mbps	4,032	FO, CX

^aUsing 64 kbps encoding.

^bTP = twisted pair cable, FO = fiber optic cable, RD = radio, CX = coaxial cable.

Table 1-2 SONET Hierarchy

OPTICAL CARRIER LEVEL	OPTICAL LINE RATE	SYNCHRONOUS TRANSPORT SIGNAL LEVEL
OC-1	51.840 Mbps	STS-1
OC-3	155.520 Mbps	STS-3
OC-9	466.560 Mbps	STS-9
OC-12	622.080 Mbps	STS-12
OC-18	933.120 Mbps	STS-18
OC-24	1,244.160 Mbps	STS-24
OC-36	1,866.240 Mbps	STS-36
OC-48	2,488.320 Mbps	STS-48

Whitham D. Reeve, *Subscriber Loop Signaling and Transmission Handbook* 1995 at 7-9.

DISCUSSION

Because this proceeding was convened to determine whether CLECs were impaired, according to the standards set forth in the *TRO*, without access to mass market switching, dedicated transport, and mass market high-capacity loops, this discussion will be sectioned accordingly.

I. Mass market switching.

Initially, it is necessary to discuss here the meaning of the term "mass market." In its regulations, the FCC does not explicitly define mass market, but does seem to equate a mass

market customer with one taking service over a "DS0 capacity loop." 47 C.F.R. §51.319(d)(2).

In the *TRO* itself, however, the FCC elaborated on this issue:

The record demonstrates that customers for mass market services are different from customers in the enterprise market.¹⁴⁰² The mass market for local services consists primarily of consumers of analog "plain old telephone service" or "POTS" that purchase only a limited number of POTS lines and can only economically be served via analog DS0 loops.¹⁴⁰³

¹⁴⁰² Mass market customers are residential and very small business customers – customers that do not, unlike larger businesses, require high-bandwidth connectivity at DS1 capacity and above. Z-Tel Comments at 30-31. Mass market customers' accounts tend to be smaller, lower revenue accounts and are often serviced on a month-to-month basis and not pursuant to annual contracts.

¹⁴⁰³ Z-Tel Comments at 30-31.

TRO at ¶ 459. Verizon reads this definition to mean that if a CLEC uses a switch to serve either residential customers or business customers with even one DS0, or analog voice line, that CLEC is serving the "mass market." (Tr. 94). To further elaborate on this interpretation, a CLEC is serving the "mass market" under Verizon's view even if it serves only business customers and even if most of the lines connected to the switch are high capacity digital circuits, as long as it provides at least one DS0. Since fax machines require analog lines, this means that under Verizon's view, a business customer such as the Commonwealth of Pennsylvania, that buys primarily high capacity services, would be a mass market customer if it purchased one or more analog lines for fax machines.

The other parties to this proceeding generally dispute Verizon's interpretation. They contend that to be a "mass market" switch, the switch must actually be serving residential as well as business lines; they also contend that small numbers of analog lines provisioned in connection with large numbers of high capacity digital lines generally do not count as serving the "mass market." I mention this issue not for the purpose of deciding whether the FCC's standards,

or "triggers" for a finding of non-impairment have been met, but simply to set the stage for a discussion of switches deployed by CLECs in Pennsylvania.

Specific switch locations and numbers of customers served are proprietary to the CLECs, consequently they will not be discussed in this Summary so as to avoid having to make the Summary proprietary. However, I will attempt to discuss the situation in such a manner as to provide a general feel concerning the presence of competitive switching across Pennsylvania.

The Commission, in its questions to the Footnote 14 CLECs, attempted to determine the locations of the switches operated by those companies to provide service to Pennsylvania and the number of lines served by those switches. Verizon also attempted to glean such information independently of the Commission's efforts. Verizon used its internal billing databases to determine where, and to whom, Verizon leases 2-wire and 4-wire stand-alone UNE loops (including EELs), without switching in Pennsylvania. Verizon used the E911 database to determine the number of residential customers served by carriers that bypass Verizon's network altogether to serve "mass market" customers over their own loop facilities (these would not show up in Verizon's study of its internal billing databases). Verizon provided the results of this combined analysis in Attachment 2 to Verizon Statement 1.0. Verizon also attempted to add to its exhibit the information reported by the Footnote 14 CLECs. (Verizon St. 1.2, Attachment 5). Finally, Verizon attempted to update its exhibit as Exhibit 1 to its Main Brief. The other parties have objected to this exhibit on various bases, and I will discuss those objections. Nevertheless, this exhibit, which is proprietary, is the most comprehensive compilation of this information that is in the record. The Footnote 14 responses were admitted into the record as ALJ Exhibits 1 through 17, inclusive.

The biggest single problem with Verizon's compilation is that it does not separate residential from small business lines. This treatment is consistent with Verizon's position that it is sufficient for a CLEC to be considered a trigger candidate for "mass market switching" for the CLEC to provide any service to businesses over DS0 lines. Thus, it is impossible to determine from Verizon's compilation those lines that serve residential customers.

The next biggest problem with the Verizon exhibit revolves around the treatment of "Adelphia." One of the Footnote 14 CLECs was Adelphia Business Solutions of Pennsylvania, Inc. To my knowledge, this is the company that holds the contract with the Commonwealth of Pennsylvania for the provision of telephone and data networks services to the entire Commonwealth government, as well as to local governmental entities, such as school districts and municipalities that choose to take service from it. It now does business as "TelCove." TelCove submitted a response that included its affiliates, including PECO TelCove, which was formerly known as PECO Hyperion Communications. (Ex. ALJ-15). When Verizon submitted its rebuttal testimony, it included large numbers of allegedly mass market lines for "Adelphia" in virtually every wire center. (Verizon St. 1.2, Attachment 5). Again, these numbers are proprietary so they will not be repeated here; but, for example, the number of lines reported for the Harrisburg Metropolitan Statistical Area (MSA) was so large in comparison to the population of the Harrisburg area that the reported lines had to include those under the Commonwealth contract. The numbers for other areas were similarly so large as to indicate that they included the phone lines of the Commonwealth government. The Verizon witness who sponsored this exhibit seemed to be unaware that Adelphia Business Solutions had the Commonwealth telecommunications contract, but he did acknowledge that the Commonwealth would likely be an enterprise customer and not a mass market customer. (Tr. 116-119).

A second problem with Verizon's "Adelphia" data is that it included lines that purportedly are attributable to Adelphia Communications Corporation, a cable television company. Although Verizon acknowledged in its rebuttal testimony that Adelphia (the cable company) might no longer be affiliated with TelCove, it included lines that Verizon attributed to Adelphia in the TelCove counts. (Verizon St. 1.2 at 22-23, n.5).

Verizon attempted to recover from these Adelphia related problems by revising its compilation when it filed its Main Brief. Attached to Verizon's Main Brief as Exhibit 1 is a new version of the compilation of lines that Verizon characterizes as "mass market." In this compilation, Verizon has attempted to separate out the Adelphia cable and the Commonwealth

contract lines from other lines provided by TelCove. According to Verizon, the number it attributes now to Adelphia Cable are those that it gleaned from the E911 residential listings. Also according to Verizon, it has removed the lines reported by TelCove, but retained the lines that Verizon claims that it leases to PECO TelCove, a TelCove affiliate, as standalone voice grade UNE loops. (Verizon Main Brief at 33-35).

The other parties raise various objections to Verizon's compilation. Some of those objections concern whether or not certain CLECs or specific lines should be counted as "trigger candidates" under the FCC's standards. For example, the non-Verizon parties generally oppose the counting of cable telephony providers such as Comcast and RCN as trigger candidates, as well as affiliates of small ILECs, such as CTSI (which is affiliated with Commonwealth Telephone), Penn Telecom (an affiliate of North Pittsburgh Telephone), and CEI Network (an affiliate of Denver and Ephrata telephone). (E.g., AT&T Main Brief at 48-53, 57-61). Other objections concern the accuracy of Verizon's counts. Considering that the FCC's standards are not "operative," I will not discuss those objections that concern whether certain CLECs or lines should be counted as trigger candidates. I will discuss, however, those that concern the accuracy of the counts.

There is a dispute between AT&T and Verizon over the line counts provided by Verizon for XO. (Compare AT&T Main Brief at 46 with Verizon Reply Brief at 20-21). Verizon's explanation of the discrepancy between its count for XO (which counted all of the DS0s that it leases to XO) with XO's count (which counted only those DS0s used to serve customers who took only DS0s (and no higher capacity services) appears to adequately resolve this issue. While I do not endorse Verizon's method, it is consistent with Verizon's position that any DS0 lines served count as "mass market" lines, even if they are served to enterprise customers.

OCA has raised an issue regarding Verizon's use of the E911 database to ascertain the presence of lines used to serve mass market customer who are not served by Verizon lines. OCA argues that the E911 database does not distinguish between residential customers served by

individual lines and residential customers buying service purchased by a landlord, for example, and resold to tenants. OCA argues that such service would be properly classified as enterprise rather than mass market. (OCA Main Brief at 40-42). Although Verizon responds to this objection in its Reply Brief at 13-14, it does so very summarily. In any event, there appears to be no way to quantify whatever difference this may make, although it appears unlikely to be large.

On balance, except for the PECO-TelCove and Adelphia cable issues, the failure of Verizon to identify residential as opposed to business lines, and the extent to which it includes DS0's provided to enterprise customers, Exhibit 1 to Verizon's Main Brief appears to be a reasonably accurate "snapshot in time " of the non-enterprise lines served by other than Verizon switching. Reference to the responses of the Footnote 14 CLECs to the Commission's interrogatories (Exhibits ALJ-1 through ALJ-17) provides some information on the residential/business question. Generally speaking, there appear to be only four companies that are providing facilities based service to residential customers (of greater than *de minimis* numbers of lines). Comcast in the Pittsburgh area and RCN in the Philadelphia area are serving substantial numbers of residential customers using cable telephony. CTSI and CEI are serving much smaller, but not insignificant, numbers of customers, apparently using the switches of their ILEC parents in conjunction with Verizon loops. Notwithstanding Verizon's claims, I do not believe that Adelphia, the cable company, is providing local exchange service. The number of lines attributed by Verizon to Adelphia is extremely small, suggesting that they may be from a trial of some sort that may or may not be active.

On the business side, there are significant numbers of DS0 lines being served by non-ILEC switches in the Allentown-Bethlehem-Easton, Harrisburg-Carlisle, Philadelphia-Camden-Wilmington, Pittsburgh, and Scranton--Wilkes-Barre Metropolitan Statistical Areas (MSAs). There are smaller, but not *de minimis*, numbers in the Lancaster, Lebanon, and Reading MSAs. Some of these lines are, undoubtedly, being provided to enterprise customers along with higher capacity lines. Again, it is necessary to emphasize that I am making no findings regarding whether the FCC's standards have been met, and that I am not quoting numbers here because they

are proprietary. Readers with access to the proprietary record are urged to view Exhibit 1 to Verizon's Main Brief and Exhibits ALJ-1 through 17 for more detailed information.

In terms of competition generally, it is important to note that these data do not reflect the extent to which CLECs serve enterprise (as opposed to mass market) customers with their own facilities. Nor do they reflect residential customers' use of cell phones in substitution for wireline service, or the use of Voice Over Internet Protocol (VOIP), either over public broadband connections or over enterprise data networks, as a substitute for wireline voice service.

II. Transport.

While this issue appears complex at first glance (especially if one reads the Verizon and AT&T Briefs), it is not so. However, due to the FCC's rules, the Commission's attribution of the burden of proof to Verizon, and the limited time available for the proceeding, the information obtained was somewhat less than comprehensive.

To understand the underlying problem it is necessary to first understand what is at issue here. It is useful to start with a quote from AT&T's Main Brief:

First, it is critical to define what specifically is in issue here. In common industry usage, "dedicated transport" is any carrier transmission facility that is for the exclusive use of a particular customer for the provision of telecommunications services. This type of transport is "always on" and immediately available to the customer. It is contrasted to "common" or "shared" transport, which is a facility that may be shared among a number of customers and is dedicated to none. While common or shared transport may be switched, dedicated transport by definition never is, because when a circuit is switched it ceases to be dedicated to the use of a particular customer.

However, for purposes of this impairment proceeding, "dedicated transport" has a far narrower meaning. In the *TRO*, the FCC redefined dedicated transport to be "transmission facilities connecting incumbent LEC switches and wire centers within a LATA."²⁸⁴ This definitional change means that "only those transmission facilities *within* an incumbent LEC's transport

network, that is, the transmission facilities between incumbent ILEC switches," fall within the incumbent ILEC's unbundling obligation.²⁸⁵ This new definition explicitly excludes "backhaul" facilities between an ILEC wire center and a CLEC location, such as a CLEC switching office, which CLECs use to aggregate and "backhaul" their traffic. These are sometimes known as "entrance facilities."²⁸⁶

²⁸⁴ *TRO* ¶ 365 (footnote omitted).

²⁸⁵ *TRO* ¶ 366 (emphasis in original).

²⁸⁶ Thus, whenever the term "dedicated transport" is used herein, it refers to the transport encompassed by the FCC's *TRO* redefinition, not to the broader sense generally used. Also, "wire center" and "central office" may be used interchangeably.

(AT&T Main Brief at 76). To summarize, then, before the *TRO*, the dedicated transport UNE included transport between an ILEC central office and a CLEC switch, as well as between ILEC central offices. In the *TRO*, the FCC found that CLECs were not, as a general rule, impaired by the unavailability of dedicated transport between their switches and the ILEC central offices; thus dedicated transport along those routes ceased to be available as a UNE.¹ On the other hand, the FCC found impairment for dedicated transport between ILEC central offices, but allowed the state commissions to rule otherwise in a proceeding such as this. The FCC also found that the CLECs were not impaired for dedicated transport at OCn levels of capacity, but only for dark fiber and the lower DS-1 and DS-3 levels of capacity. *TRO* ¶389. These distinctions are key to the balance of this discussion.

At this point, I should note that the FCC defined several separate issues regarding dedicated transport. Specifically, the FCC directed the states to consider whether competing carriers are already providing non-ILEC transport facilities to themselves (the "self-provisioning trigger) as either "dark fiber" or at the DS3 level of capacity, and whether competing carriers are

¹ The CLECs challenged the FCC ruling on "entrance facilities" at the Circuit Court. The Court remanded without vacating that portion of the *TRO* on the ground that the FCC had not sufficiently explained its rationale for its ruling. *USTA*, 359 F. 3d at 585-586.

already providing non-ILEC transport facilities to others (the "wholesale trigger") as dark fiber or at the DS1 or DS3 capacity levels. *See generally*. *TRO* ¶¶ 400-416.²

Two other points must be observed to understand the balance of this discussion. First, the FCC directed that impairment be evaluated on a route specific basis. *TRO*, ¶401. Second, the FCC stated that a route need not be a direct connection between two points, but could connect the two points via a third. The specific language is as follows:

We define a route, for purposes of these tests, as a connection between wire center or switch "A" and wire center or switch "Z."¹²⁴² Even if, on the incumbent LEC's network, a transport circuit from "A" to "Z" passes through an intermediate wire center "X," the competitive providers must offer service connecting wire centers "A" and "Z," but do not have to mirror the network path of the incumbent LEC through wire center "X."

TRO, ¶401. The Court disagreed with the FCC's use of a route specific analysis to determine impairment in the context of dedicated transport. *USTA*, 359 F. 3d at 574-575. Consequently, it is doubtful that this method of determining impairment for dedicated transport will be of any usefulness in the future.

Verizon's attempt to discover evidence on this issue is adequately described in its Main Brief:

Verizon conducted physical inspections of all collocation arrangements included in its original triggers case, and determined where CLECs had powered equipment in place and non-Verizon fiber optic cable that both terminated in the collocation facility and left the Verizon wire center.

(Verizon Main Brief at 38). Verizon refers to this as its "pairing report." Verizon assumes that a particular CLEC that has lit fiber at two Verizon central offices is capable of providing transport between those offices. In the most simplistic sense, Verizon assumes that a CLEC that has lit fiber in Verizon central office A and lit fiber in Verizon central office B either does or can

² I will not discuss the "wholesale" issue here. Although the parties spent considerable ink and paper on this issue, I am concerned here only with what facilities may be identified as in place, not with whether the owners are trying to market them to others.

provide dedicated transport between A and B. Although much time was spent on this issue, most it was spent arguing about the meaning of the FCC's standards, and about who bore the burden of proof and/or the burden of going forward with evidence. Nevertheless, Verizon's pairing report does not establish how the fiber is being used today, but merely how it might be used. Essentially, much, if not most, of this fiber, is likely being used for other purposes, including the CLEC entrance facilities for which UNEs are no longer available.

Verizon also assumed that even if the fiber is being operated at an OCn level of capacity, it may be used to provide DS-1 and DS-3 circuits by "channelizing" the higher capacity OCn circuit into lower capacity DS-1 and DS-3 circuits. Under Verizon's interpretation of the *TRO*, it doesn't matter whether this fiber is actually being used for transport between Verizon central offices as DS-1 or DS-3 circuits, only that it could be so used with minimal to moderate network modifications on the part of the CLECs. (See, e.g., Verizon Main Brief at 59-62).

As far as what facilities are actually in place, it is important to realize that Verizon's essential position (that this fiber is available for dedicated transport even if it is not being so used today) actually involves several assumptions, including, at minimum: that the fiber on any given "route" has spare capacity, and that the CLEC has in place (or can put into place on very short notice) the electronics to properly channelize the circuit from an OCn level down to DS1 or DS3, as well as electronics needed to use the fiber for transport that does not terminate at the CLEC switch, such as add-drop multiplexers in Verizon's central offices (where additional collocation space may be required), and digital cross-connect equipment in the CLEC switching center. (See, e.g., Verizon Reply Brief at 38-40).

While Verizon's "pairing report" shows where various CLECs have fiber in place, it does not necessarily show where they can actually transport traffic between two Verizon central offices today, but merely where they potentially could do so. No party chose to present more detailed evidence on this issue; each side was, apparently, willing to rest on its interpretation of the *TRO*, coupled with an argument that the other side had the burden of proof, or the burden of going forward with the evidence, on this issue. While the FCC's standards are

now defunct, a collateral consequence of the litigation strategies followed by all sides here is that the resulting evidence is of limited use in determining what is in place today.

Attached to Verizon's Main Brief as Exhibit 2, Attachment A is Verizon's list of routes on which it claims that various CLECs can self-provision DS3 circuits. This is an updated version of the exhibit that Verizon offered in the hearings. Most of the information is proprietary. The most that one can conclude from it is that in the Philadelphia, Pittsburgh, Allentown and Harrisburg areas, there is considerable non-Verizon fiber that might be used to interconnect Verizon central offices. The responses of the Footnote 14 CLECs are not useful here because the question merely asked them to list "transport facilities" generally, and not dedicated transport between ILEC central offices.

Regarding "dark fiber", Verizon assumed that where a CLEC has lit fiber, it also has dark fiber. The rationale behind this assumption is that when a carrier installs fiber, it installs more than enough to meet its presently existing demand. (Verizon Main Brief at 45-46). The updated version of this list is Exhibit 2, Attachment B to Verizon's Main Brief. While I am inclined to agree with Verizon's rationale that carriers install more fiber than they need at the time of installation, nothing in the record here tells you when the fiber on any particular "route" was installed, and whether usage on that route has since increased to exhaust the original excess capacity. In the proceeding, this issue also degenerated into an argument about who bore the burden of proof and who was in the best position to present evidence, which are nice legal arguments but do not assist in understanding what is presently in place.

The transport issue also revealed a problem with the Commission's initial interrogatories. Those questions were directed at 14 named companies, each of which is, to my knowledge, a CLEC. Much of the non-Verizon fiber is provided by other companies, such as City Signal, which does not appear to be a CLEC but rather a competitive access provider. Because City Signal, for example, was not sent the Commission's interrogatories and chose not to participate, the record is silent as to its description (as opposed to Verizon's) of its own facilities.

III. High Capacity Loops.

As explained in AT&T's Main Brief, the FCC found no impairment for CLECs needing loops of the OC3 capacity or higher, but found impairment for DS-1 and DS-3 loops, and dark fiber, subject to a state commission's contrary finding after a proceeding such as this. (AT&T Main Brief at 93-94). Like the dedicated transport UNE, the FCC defined self-provisioning triggers and wholesale triggers. (As in the case of dedicated transport, I am not going to discuss separate issues that relate only to wholesale).

As in the case of switching and dedicated transport, Verizon's Main brief contains an updated exhibit, Exhibit 3, listing those customer locations that Verizon claims meet the FCC triggers for a finding of no impairment. As in the case of the dedicated transport UNE, the FCC defined self-provisioning triggers and wholesale triggers. That exhibit, like the others listed herein, is proprietary. As in the case of dedicated transport, Verizon assumed (unless the carrier specifically denied it in testimony) that a carrier who had an OCn circuit running to a customer location could channelize it down to DS-1 and DS-3 levels, and that the presence of lit fiber meant the presence of dark fiber, as well as certain other assumptions that are of less importance. (Verizon Main Brief at 67-69). One of those assumptions is that a carrier that has fiber running to a particular building (or other single location, like a commercial park), can serve any customer at that location. Verizon used CLEC interrogatory responses to determine the location of CLEC high capacity loops. (Verizon Main brief at 66).

The CLEC objections to Verizon's data on this issue were concentrated in three areas. The CLECs attacked Verizon's assumption concerning the ability of each respective carrier to channelize OCn circuits to lower capacity levels. They also attacked Verizon's assumption that there is dark fiber wherever there is lit fiber. Finally, they attacked Verizon's assumption that a CLEC that has fiber going into a particular location can access customers throughout that location. (E.g., AT&T Main Brief at 96-103). The argument concerning whether a particular CLEC has access to an entire location if it has access at all, is primarily an argument over the meaning of the FCC's now defunct standards. (E.g., Sprint Main Brief at 31-32).

Ultimately, as in the case of dedicated transport, this argument also involves a burden of proof/burden of going forward with the evidence argument.

Verizon's assumptions here concerning the ability of carriers to channelize these circuits, and the presence of dark fiber, may be more defensible in the context of high capacity loops than in the context of dedicated transport, but they are still assumptions. The same may be said of the assumption that a CLEC with access to a location can serve every potential customer there. Even though these assumptions might be valid, they do not tell you what is in place today, as opposed to what might be in place, or what might be put in place. Subject to these caveats, Exhibit 3 to Verizon's Main Brief lists several locations, all in the Philadelphia Metropolitan Area or the City of Pittsburgh, to which a few CLECs have deployed their own high capacity loops.

SUMMARY

The information regarding the state of facilities based telephone competition that may be gleaned from this record is interesting but limited. It is limited by the time within which this proceeding was required to be completed, which, in turn, limited the parties' opportunities to use discovery to further explore ambiguous information provided by each other. It is limited also by the litigation strategies chosen by the parties. If, for any reason, the Commission decides it needs such information in the future, it should allow more time for its collection. Also, it might be prudent to send any Commission interrogatories to all actively operating telephone companies and not merely to a select few. It appears that the information that was sought here is more complex than was understood when the Commission's order was prepared. If this, or similar information, is expected to be needed on an ongoing basis, it would be prudent to engage in a rulemaking to require periodic reporting of such information in a standard format. Considering the potential usefulness of some of this information to persons of ill intent, it would also be prudent to limit access to it and not make it publicly available.

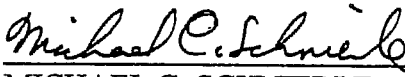
The Commission stated in its Secretarial Letter requiring the issuance of this Summary that the parties would be permitted to comment on this Summary. The Commission did not set a time limit for such comments. To implement this aspect of the Commission's Letter, I will order that such comments be filed with the Commission Secretary within 30 days of the date of this Summary, unless otherwise ordered by the Commission. Thirty days appears to be sufficient to allow the filing of such comments.

ORDER

THEREFORE,
IT IS ORDERED:

That the parties to this proceeding may file comments to this Summary within 30 days of the date of this Summary, unless otherwise ordered by the Commission. Such comments shall be filed with the Secretary of the Commission and served on the other parties to this proceeding.

Date: June 22, 2004


MICHAEL C. SCHNIERLE
Administrative Law Judge

I-00030099 Investigation into the Obligation of Incumbent Local
Exchange Carriers to Unbundle Network Elements.

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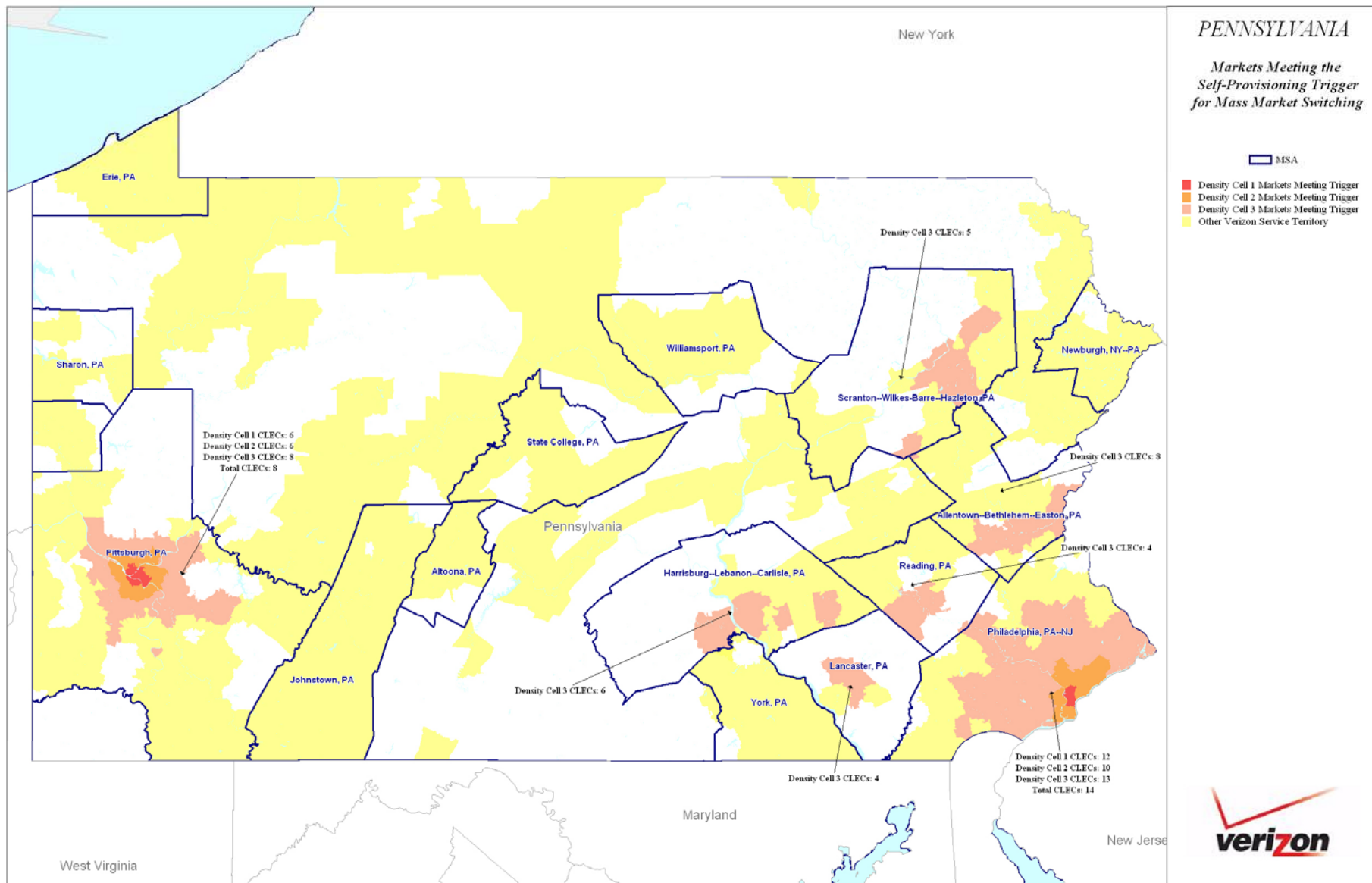
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Attachment B